

AUG 17 2018

Dept.: C5  
Monday 8/20/2018

DAVID H. YAMASAKI, Clerk of the Court

**SANDRA GILBERT**  
DEPUTY

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7 **SUPERIOR COURT OF THE STATE OF CALIFORNIA**  
8 **COUNTY OF ORANGE, CENTRAL JUSTICE CENTER**

10 PEOPLE OF THE STATE OF CALIFORNIA,  
11 *Plaintiff,*

12 vs.

13 JOHN DOES 1-58,<sup>1</sup>

14 *Defendant.*

Case No.:

**M 17638**

EMERGENCY ORDER  
REQUESTING THIS COURT: (1)  
APPOINT A SPECIAL MASTER  
FOR UNLAWFULLY RECORDED  
ATTORNEY-CLIENT PHONE  
CALLS (2) ORDER OCDA,  
COUNTY COUNSEL, AND LAW  
ENFORCEMENT TO  
IMMEDIATELY CEASE  
ACCESSING UNLAWFULLY  
RECORDED PHONE CALLS; AND  
(3) ORDER LAW ENFORCEMENT  
TO RETURN HARD COPIES OF  
PHONE CALLS AND DESTROY  
OTHER COPIES; POINTS AND  
AUTHORITIES; EXHIBIT;  
[PROPOSED] ORDER

19  
20 **MOTION**

21 The Orange County Public Defender's Office hereby requests this court make the

22  
23 <sup>1</sup> GTEL, the Orange County Sheriff's Department phone system, has identified 1,079 inmate  
24 phone calls "inadvertently" recorded on the GTEL system. Of the 1,079 calls, GTEL claims  
25 that 58 of those calls were accessed 87 times. (Exhibit A.) At a minimum, it appears that  
26 outside law enforcement agencies are in possession of at least 58 unlawfully recorded calls. It  
27 is unclear if the 58 calls constitute 58 individuals or if the 58 calls constitute fewer individuals  
28 who were recorded multiple times. It is further unclear if GTEL has underestimated the amount  
of calls accessed.

1 following orders concerning the recent revelation of the illegally recorded attorney-client  
2 privileged phone calls from Orange County Jail:

3 (1) Appoint a special master pursuant to California Penal Code § 1524<sup>2</sup> and State Bar  
4 Rule 7.100.

5 (2) Order the prosecution team, including the Orange County District Attorney's  
6 Office, the Orange County Counsel Office, the Orange County Sheriff's  
7 Department, and any other law enforcement agency, to cease reviewing, listening,  
8 and accessing any of the unlawfully recorded attorney-client privileged phone calls.

9 (3) Order any law enforcement agency which may have unlawfully obtained such  
10 recordings to return hardcopy recordings to the appointed Special Master and  
11 destroy any other copies.

12 This emergency request for an order is based upon Penal Code § 1524, State Bar Rule  
13 7.100, the attached Points and Authorities, the attached exhibit, argument of counsel, and any  
14 evidence introduced at the hearing.

## 15 POINTS AUTHORITIES AND ARGUMENTS

### 16 Introduction

17 "The client, whether or not a party, has a privilege to refuse to disclose, and to prevent  
18 another from disclosing, a confidential communication between client and lawyer." (Evid.  
19 Code, § 954.) "Protecting the confidentiality of communications between attorney and client  
20 is fundamental to our legal system. The attorney-client privilege is a hallmark of our  
21 jurisprudence that furthers the public policy of ensuring 'the right of every person to freely  
22 and fully confer and confide in one having knowledge of the law, and skilled in its practice, in  
23 order that the former may have adequate advice and a proper defense.'" (*DP Pham, LLC v.*  
24 *Cheadle* (2016) 246 Cal.App.4th 653, 675, citing *Clark v. Superior Court* (2011) 196  
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27 <sup>2</sup> All further references are to the California Penal Code unless otherwise noted.

1 Cal.App.4th 37, 48.)

2 Moreover, “[t]he right to effective assistance of counsel includes the right to confer in  
3 absolute privacy.” (*County of Nevada v. Superior Court* (2015) 236 Cal.App.4th 1001, 1007.)  
4 “When others can overhear attorney-client communications, there is an impermissible chilling  
5 effect on the constitutional right to counsel.” (*Id.*)

6 Indeed, the act of eavesdropping on and recording jail inmates’ phone calls to attorneys  
7 without permission from all parties constitutes a felony. (Pen. Code, § 636(a) [“Every person  
8 who, without permission from all parties to the conversation, eavesdrops on or records, by  
9 means of an electronic device, a conversation, or any portion thereof, between a person who  
10 is in the physical custody of a law enforcement officer or other public officer, or who is on the  
11 property of a law enforcement agency or other public agency, and that person’s attorney... is  
12 guilty of a felony...”].) This statute is based upon the Legislature’s stated desire to combat  
13 the evils of “invasion of privacy... [which] is a serious threat to the free exercise of personal  
14 liberties and cannot be tolerated in a free and civilized society.” (*Romero v. Securus*  
15 *Technologies, Inc.* (S.D. Cal. 2016) 216 F.Supp.3d 1078, 1088.)

16 **I. THIS COURT SHOULD APPOINT A SPECIAL MASTER TO REVIEW**  
17 **THE RECORDINGS OF ATTORNEY-CLIENT PRIVILEGED PHONE**  
18 **CALLS TO DETERMINE THE MAGNITUDE OF THE BREACH AND**  
19 **TO EVALUATE WHICH CASES AND CLIENTS WERE AFFECTED**  
20 **BY THIS BREACH**

21 It is undisputed that “surreptitious electronic eavesdropping under certain  
22 circumstances may amount to an unreasonable search or seizure.” (*Lanza v. State of N.Y.*  
23 (1962) 370 U.S. 139, 142.) Furthermore, electronic surveillance constitutes an illegal search  
24 and unwarranted invasion of privacy when an individual has a subjective expectation that the  
25 monitored conversation will be kept private. (*People v. Santos* (1972) 26 Cal.App.3d 397, 402;  
26 *Katz v. United States* (1967) 389 U.S. 347.) In fact, “even in a jail, or perhaps especially there,  
27 the relationships which the law has endowed with particularized confidentiality must continue  
28 to receive unceasing protection...” (*Lanza, supra*, 370 U.S. 143-144.)

1 In situations involving the potential seizure of confidential attorney-client information  
2 by law enforcement, the law permits a court to appoint a "special master" to monitor the  
3 privileged information.<sup>3</sup> A special master is defined as "an attorney who is a member in good  
4 standing of the California State Bar and who has been selected from a list of qualified attorneys  
5 that is maintained by the State Bar particularly for the purposes of conducting the searches  
6 described in this section." (Pen. Code, § 1524(d)(1).) Because the special master is a lawyer  
7 who has no relationship with any of the parties, "[i]nformation obtained by the special master  
8 shall be confidential and may not be divulged except in direct response to inquiry by the court."  
9 (*Id.*)

10 It is axiomatic that neither the Orange County District Attorney's Office, County  
11 Counsel, Sheriff's Department, and/or any outside law enforcement agency can be expected  
12 to serve in a neutral, investigative capacity to evaluate these phone calls given the significant  
13 violations of attorney-client privilege in this case.<sup>4</sup> Thus, this Court should order the  
14 appointment of a special master.

15 **II. THIS COURT SHOULD ORDER LAW ENFORCEMENT,**  
16 **INCLUDING BUT NOT LIMITED TO THE ORANGE COUNTY**  
17 **DISTRICT ATTORNEY'S OFFICE, COUNTY COUNSEL, THE**  
18 **ORANGE COUNTY SHERIFF'S DEPARTMENT, AND ANY LAW**  
19 **ENFORCEMENT AGENCY, TO CEASE ACCESSING, LISTENING**  
20 **TO, OR RECORDING ANY PRIVILEGED ATTORNEY-CLIENT**  
21 **PHONE CALLS FROM INMATES AT THE JAILS AND FURTHER**  
22 **REQUIRE LAW ENFORCEMENT AGENCIES TO RETURN ANY**  
23 **UNLAWFULLY POSSESSED HARDCOPY RECORDINGS IN THEIR**  
24 **POSSESSION AND DESTROY ANY OTHER COPIES**

24 <sup>3</sup> Although the typical context is by way of a lawfully executed search warrant, there is nothing  
25 in the law that prohibits the appointment of a special master under other circumstances. (See,  
26 generally, Pen. Code, § 1524.)

26 <sup>4</sup> The Public Defender's Office cannot review the recordings and/or determine which lawyers  
27 represent which inmates on the recordings given the potential for a conflict of interest with  
28 inmates represented by private conflict panel or privately retained counsel.

1 This court must make an order preventing the government from accessing these  
2 recorded attorney-client privileged phone calls and require any outside law enforcement  
3 agencies to return any copies unlawfully possessed by them. At present, the evidence indicates  
4 that the law enforcement agencies referenced above were aware that attorney-client privileged  
5 phone calls were recorded without the defense's knowledge.<sup>5</sup> Despite legal and ethical  
6 obligations, multiple agencies in Orange County chose to remain silent about these unlawfully  
7 recorded phone calls. Indeed, "[t]o protect the sanctity of the privilege and to discourage  
8 unprofessional conduct, an attorney has the ethical obligation to protect an opponent's  
9 privileged and confidential information, and that of third parties, when the attorney receives  
10 the information without a waiver from the holder of the privilege." (*Clark, supra*, 196  
11 Cal.App.4th 37, 48.) These obligations are crucial to ensure parties "respect the legitimate  
12 interests of fellow members of the bar, the judiciary, and the administration of justice." (*Rico*  
13 *v. Mitsubishi Motors Corp.* (2007) 42 Cal.4th 807, 818.)

### 14 CONCLUSION

15 Confidential attorney-client communications are the hallmark of the criminal justice  
16 system. This Court must act immediately to mitigate the significant harm inflicted by the  
17 unlawful recordings of these privileged conversations.

18 To safeguard the rights of inmates at Orange County Jails, this Court should (1) appoint  
19 a special master and (2) order law enforcement, including the Orange County District  
20 Attorney's Office, County Counsel, the Orange County Sheriff's Department, and any outside  
21 law enforcement agency, to cease accessing, recording, or listening to any privileged attorney-  
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24  
25 <sup>5</sup> In addition to other law enforcement agencies who received these phone calls and could  
26 presumably hear that they contained attorney-client privileged information, County Counsel  
27 was also aware of this issue. Indeed, according to the testimony of OCSD employee Boston,  
28 Mr. Boston stated OCSD has been discussing the issue with County Counsel. (Testimony of  
Boston, August 13, 2018, R.T. 42.)

1 client phone calls from inmates at the jail and to immediately return any recordings in their  
2 possession to the special master.

3  
4 DATED: August 17, 2018

Respectfully submitted,  
SHARON L. PETROSINO  
Public Defender  
Orange County

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SARA ROSS  
Assistant Public Defender  
Supervising Attorney  
Writs & Appeals Unit

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## EXHIBIT A





Global Tel\*Link Corporation  
www.gtl.net

Corporate Headquarters  
12021 Superfunds Road  
Suite 100  
Boston, MA 02190

Operations Center  
30111 Frank Avenue  
2nd Floor  
Hialeah, FL 33157

July 27, 2018

***Via Email and Overnight Delivery***

Orange County Sheriff's Department  
Attention: Sheriff Sandra Hutchens  
550 N. Flower Street  
Santa Ana, CA 92703

Dear Sheriff Hutchens,

This letter summarizes our recent discussion in which Global Tel\*Link Corporation (GTL) advised the Orange County Sheriff's Department that GTL had recently discovered that, during the transition from the Lazerphone to ICMv platforms in January of 2015, a technical error occurred. This technical error resulted in the inadvertent recording of 1,079 inmate telephone calls made over an approximate three-year period to phone numbers that were designated by the County as "do not record." Parties to those 1,079 calls heard a prompt during each of the calls advising that the call was "subject to monitoring and recording." After conducting research, we have determined that the Sheriff's Department staff, and in certain circumstances GTL for investigative or technical purposes, accessed 58 of those 1,079 recorded calls a total of 87 times.

Upon determining that this error had occurred, GTL immediately took the following corrective action: First, GTL blocked access to these recordings and second, GTL reloaded the list of telephone numbers provided by the County and identified by the County as not to be recorded into the ICMv phone system database so that they are again marked "do not record". As of July 6, 2018, the system platform has been updated so that all phone numbers contained on this list are marked appropriately and will not be recorded. We have preserved the previously-made recordings and will maintain them without providing further access to anyone, should the recordings be needed in furtherance of the County's review of this incident.

GTL is committed to working productively and proactively with the Orange County Sheriff's Department to resolve any issues resulting from these inadvertent recordings, as well as defining a process to ensure that numbers marked as "do not record" are validated and uploaded accordingly. We have reviewed all the telephone numbers whose calls should not be recorded, confirmed the reload of the numbers in our database, and tested the database to ensure that it is functioning properly. As you know, we have previously provided training on the system to the Orange County Sheriff's Department and will continue to provide any refresher training if needed. We also have enhanced our quality assurance program and will conduct additional internal training sessions designed to minimize the possibility of future errors. GTL remains committed to implementing any appropriate changes to our systems, to identify and prevent other problems.





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Reston, VA 20190

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Reston, VA 20190

GTL values its relationship with Orange County and appreciates your efforts to assist in correcting this issue. Should you have any questions, or need additional information, please do not hesitate to contact me.

Thank you.

A handwritten signature in black ink that reads "Darren Wallace". The signature is fluid and cursive, with the first name "Darren" and last name "Wallace" clearly distinguishable.

Darren Wallace  
Executive Vice President, Operations